Supreme Court, U.S.
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No. 99-1897

IN THE

Supreme Court of the United States

BOBBY R.; JOYCE R.; and CAIUS R.,

Petitioners,

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a disabled public school student who benefited educationally from an Individualized Educational Program ("IEP") that was reasonably calculated to provide him such benefit received a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, and the holding in *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), despite the fact that certain educational services prescribed by the student's IEP were not all timely or consistently provided.

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OPINIONS BELOW

The administrative hearing officer's decision of April 2, 1997, finding that Petitioner had been denied a FAPE by Respondent in violation of the IDEA is set out in the Appendix to Petitioner's Petition for a Writ of Certiorari at App. 37a-54a. The District Court's March 24, 1998, Memorandum Opinion granting Respondent's Motion for Summary Judgment and reversing the decision of the hearing officer as well as the District Court's Final Judgment of the same date are both set out in the Appendix to Petitioner's Petition for a Writ of Certiorari at App. 18a-36a. The January 20, 2000, opinion of the Fifth Circuit Court of Appeals affirming the District Court also is included in the Appendix to Petitioner's Petition for a Writ of Certiorari at App. 1a-17a. The Order of the Fifth Circuit of February 7, 2000, denying Petitioner's Motion to Stay Mandate and Motion to Extend Time to File a Petition for Rehearing, is set out at App. 1a of the Appendix herein.

STATEMENT OF THE CASE

SUMMARY OF THE REASONS FOR DENYING THE WRIT OF CERTIORARI

1. There is no conflict between the Fifth Circuit's decision and the IDEA. *See Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). When the appropriateness of an IEP developed by a school district and the resulting educational placement are challenged, this Court has established that a reviewing court's inquiry is generally twofold. It must ask first whether the school district complied with the procedures set forth in the IDEA, and, if so, whether the IEP developed through the IDEA's procedures was

reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206-07. Only the second prong or the *Rowley* test is involved in this case. Although Petitioner's IEP was individualized and reasonably calculated to provide him with a meaningful educational benefit, he claims that the failure to consistently and timely provide each service prescribed by the IEP (irrespective of the overall educational benefit received) is a violation of the IDEA. This argument ignores the standard set forth by this Court in *Rowley* for determining "educational benefit" under the IDEA, which merely requires that a school district provide a "basic floor of opportunity" for every disabled child, consisting of "specialized instruction and related services which are individually designed to provide educational benefit." *See id.* at 200-01.

2. There is no conflict between the Fifth Circuit's decision and the precedent established by this Court in *Rowley*, 458 U.S. 176. Applying the standard set forth by this Court regarding "educational benefit," the Court of Appeals correctly determined that the IEP was reasonably calculated to provide Petitioner a meaningful educational benefit, that the significant provisions of the IEP were followed, and that Petitioner received an educational benefit from the IEP. Contrary to Petitioner's assertion, the Fifth Circuit did not establish a standard under the IDEA that allows public schools to "pick and choose" what parts of a student's IEP they will implement. Rather, the Fifth Circuit strictly adhered to the *Rowley* formula in finding that the Petitioner received the "basic floor of opportunity" based upon undisputed evidence that he benefited educationally from an IEP that was "reasonably calculated" to enable him to receive educational benefits. *Id.* at 206-07.

PROCEDURAL HISTORY

On May 8, 1997, Houston Independent School District ("HISD" or "the District") filed this case under the IDEA as an appeal of the administrative decision of a special education hearing officer appointed by the Texas Education Agency ("TEA"). On cross motions for summary judgment, the District Court held in a Memorandum Opinion of March 24, 1998, that the hearing officer had erred in her analysis of whether Petitioner had received a FAPE as required by the IDEA. The District Court reasoned that Petitioner had shown improvement in most areas of study and therefore had received an educational benefit in accordance with the goals of the IDEA. The District Court granted HISD's motion for summary judgment and denied Petitioner's cross motion for summary judgment. The District Court also dismissed Petitioner's counterclaim for reimbursement for the costs of the private compensatory services. Petitioner filed his Notice of Appeal to the Fifth Circuit Court of Appeals on April 22, 1998.

On January 20, 2000, the Fifth Circuit affirmed the District Court's Memorandum Opinion finding that Petitioner's IEP was reasonably calculated to provide him a meaningful educational benefit in accordance with the IDEA. The Fifth Circuit concluded that Petitioner received a benefit from his IEP as demonstrated by objective evidence of increased test scores and grade levels and, thus, Petitioner received a FAPE in accordance with the IDEA. The Court of Appeals also held that Petitioner's parents were not entitled to reimbursement for private compensatory services because there was no evidence that HISD consented to the transfer during the pendency of the appeal.

FACTS

The pertinent factual background is set forth in the Opinion of the Court of Appeals. However, certain of the material facts are discussed below to expedite the Court's understanding and disposition of this matter.[1]

Petitioner attended school in HISD for approximately seven years before his parents unilaterally removed him and placed him in private school in 1997. Petitioner qualified for special education services under the eligibility criteria learning disabled and speech impaired. During the relevant time frame in which Petitioner was enrolled in HISD, the Admission, Review, and Dismissal ("ARD") Committee meeting minutes reflect that he received highly detailed IEPs[2]

1. In the "Statement of the Case" and "Proceedings Below" sections of the Petition, Petitioner refers the Court to "the facts" — many of which are not supported by the record and none of which are material to this Court's decision.

2. Under the IDEA, special education students receive individualized instruction in accordance with an individualized education program (IEP) developed by an IEP team comprised of school administrators, teachers, and the child's parents. *See* 20 U.S.C. §§ 1401(11), 1414(d). In Texas, the IEP team referenced in 20 U.S.C. § 1414(d)(1)(B) is referred to as the Admissions, Review and Dismissal (ARD) Committee. *See Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997), *cert.-denied*, 522 U.S. 1047 (1998). An IEP is a written statement of educational services for a disabled child developed in an ARD meeting. 20 U.S.C. §§ 1401(11), 1414(d). The IEP includes an assessment of the present performance of the child, his annual goals and short-term instructional objectives, the extent to which the child can participate in regular education programs, the projected initiation date and anticipated duration of the program, and the procedures for determining whether the instructional objectives are achieved. *Id.*

and performance goals designed to meet the needs of his learning disability. The ARD Committees also carefully considered Petitioner's requirements for reading, language, math, spelling, science, social studies, fine arts, physical education, and speech and provided him modifications for each class.

During the 1994-95, 1995-96, and 1996-97 school years, HISD did not consistently implement every modification listed on Petitioner's IEP. When delays occurred, HISD acted to provide services as soon as possible and offered to compensate Petitioner for lost services. In spite of any inconsistencies in implementing certain instructional modifications, Petitioner progressed steadily under his IEPs, as demonstrated through increased test scores and grade levels.

In October 1996, Petitioner's parents filed a request for a due process hearing with the TEA claiming that the IEP developed for Petitioner for his sixth grade year (*i.e.*, 1996-97) was inappropriate and that HISD had denied Petitioner a FAPE by not consistently implementing modifications in his IEPs. The hearing took place on February 18 and 19, 1997. On April 2, 1997, the hearing officer issued a decision finding that Petitioner's IEP was appropriate and reasonably calculated to provide Petitioner with an educational benefit. However, the hearing officer found that HISD had denied Petitioner a FAPE. The hearing officer's decision was based on two findings: (1) HISD's inconsistent implementation of certain modifications to Petitioner's educational program; and (2) HISD's failure to provide Petitioner with speech therapy from January, 1995 to May, 1995, even though HISD provided Petitioner with hour-for-hour compensatory services in the summer of 1995.

Thereafter, on May 8, 1997, HISD filed this lawsuit as an appeal of the hearing officer's decision.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 states that a Petition for a Writ of Certiorari "will be granted only for compelling reasons." One situation that the Court considers compelling is where a United States Court of Appeals has decided "an important question of federal law that has not been, but should be settled by the Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c) (2000). At least one commentator has suggested that a conflict must not only be compelling and important—it must also be "intolerable." ROBERT L. STERN, SUPREME COURT PRACTICE § 4.3 (6th ed. 1985). While the Court has not specifically defined what conflicts it regards as "compelling" and "important," it seems clear that it will only review those cases presenting the most recurring and substantial conflicts on issues of utmost importance to the general public. As demonstrated below, this case is not worthy of review by this Court.

I. The Fifth Circuit's Decision In This Case Is Consistent With The Free Appropriate Public Education Requirement Of The IDEA As Interpreted By This Court.

The Fifth Circuit correctly observed that the FAPE requirement of the IDEA requires tailoring to the unique needs of the handicapped child by means of an IEP. *Rowley*, 458 U.S. at 181. The Fifth Circuit followed the procedure set forth by this Court's opinion in *Rowley*, 458 U.S. at 206-07, which analyzed whether a child received sufficient

educational benefits to satisfy the requirements of the IDEA under a two-pronged framework. The Court of Appeals correctly determined that only the second prong of the *Rowley* inquiry was at issue in this case[3] — *i.e.*, whether the IEP was reasonably calculated to enable Petitioner to receive an educational benefit.

To determine the appropriateness of an IEP, the Fifth Circuit has developed a four-part test:

> (1) whether the program was individualized on the basis of the student's assessment and performance; (2) whether the program was administered in the least restrictive environment; (3) whether the services were provided in a coordinated and collaborative manner by the key "stakeholders"; and, (4) whether positive academic and non-academic benefits were demonstrated.

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998). Applying these factors to this case, the Court of Appeals

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3. Petitioner's argument that the Court of Appeals ignored a procedural violation that occurred in this matter is baseless. The Court of Appeals correctly observed that Petitioner did not challenge the IEP or any other HISD actions under the first prong of the *Rowley* inquiry — that is, Petitioner did not assert that HISD did not comply with the procedures prescribed by the IDEA. *Bobby R.*, 200 F.3d at 347. Indeed, any such challenge by Petitioner would be meritless. As the Fifth Circuit observed, the administrative hearing officer noted in its decision that issues related to any procedural complaints were withdrawn by Petitioner prior to the beginning of the hearing. In addition, the hearing officer found that HISD had complied with the procedural requirements of the IDEA. *Id.* at 347 & n.1.

correctly noted that the first two criteria were not at issue, as the hearing officer had already concluded that Petitioner's IEP was reasonably calculated to provide Petitioner with a meaningful educational benefit and that the IEP was implemented in the least restrictive environment.

With respect to the third criteria (*i.e.*, the provision of services), the Court of Appeals correctly determined that school districts should retain some flexibility in implementing an IEP. The Fifth Circuit observed that the interpretative response from the Department of Education that provides "as long as there is no change in the overall amount, some adjustments in scheduling [IEP] services should be possible (based on the professional judgment of the service provider) without holding another IEP meeting." 34 C.F.R. part 300, App. C, question 51 (1997). Moreover, the Court of Appeals correctly determined that HISD had provided a FAPE because the significant provisions of Petitioner's IEP were followed, and, as a result, Petitioner received an educational benefit. In this regard, the Fifth Circuit concluded that in order to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.

As to the fourth criteria, the Fifth Circuit correctly found that Petitioner received an educational benefit, as demonstrated by objective evidence of increased test scores in a variety of areas as well as advancement from grade to grade under his IEP. *See Rowley*, 458 U.S. at 207. In sum, because there were no material issues of fact presented under the above criteria, the Fifth Circuit correctly found that the Petitioner received a FAPE. *Bobby R.*, 200 F.3d at 350.

Petitioner's argument that the failure to implement one or more components of the child's IEP denies a disabled child a FAPE is unsupported by any authority. Indeed, Petitioner's argument is a classic case of form over substance as it ignores the undisputed progress Petitioner made under an appropriate IEP. Petitioner advocates "strict liability" for the failure to implement all aspects of an IEP even when the student receives an educational benefit from the services provided. According to Petitioner's argument, making progress on or achieving the goals stated in an IEP would be irrelevant if certain specific modifications were not implemented 100% of the time. In *Rowley*, this Court rejected such a rigid standard, noting that Congress had adopted no substantive requirement concerning the adequacy of a child's education when it passed the IDEA. *Rowley*, 458 U.S. at 189. Rather, the FAPE requirement is met when the state provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. By this definition, Petitioner clearly received a FAPE based upon his educational progress under an IEP that was undisputedly calculated to provide benefit to him.

Petitioner also claims that there is an alleged conflict between the decision of the Fifth Circuit and opinion of this Court in *Honig v. Doe*, 484 U.S. 305 (1988). A brief examination of the holding in this case discloses that the Fifth Circuit's decision does not conflict, and that this case was correctly decided. In *Honig*, this Court held that the "stay-put" provision[4] of the IDEA prohibited unilateral

4. The stay-put provision of the IDEA provides that during the pendency of a due process proceeding or subsequent court appeal, unless the school district and the parents otherwise agree, the child (Cont'd)

removal of the student from his or her then current educational placement during the pendency of any proceedings under the Act. *See Honig*, 484 U.S. at 323-25. *Honig* also addressed the issue of mootness of a twenty-four-year-old individual's claims under the Act. *Id.* at 318-20. HISD complied with this provision of the Act. Because neither the stay-put provision of the IDEA nor Petitioner's age were issues in the case at bar, Petitioner's reliance upon *Honig* is misplaced. Consequently, there is no conflict between the Fifth Circuit's decision and this Court's opinion in *Honig*.

CONCLUSION

For the above reasons, the Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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(Cont'd)
shall remain in his "then-current educational placement" until all such proceedings have been completed. *See* 20 U.S.C. § 1415(j). This provision is designed to preserve the status quo by effecting an immediate freeze on a child's educational placement until proceedings regarding the child's placement come to a conclusion. It is undisputed that HISD complied with the this provision of the IDEA.

APPENDIX

APPENDIX — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED FEBRUARY 7, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20546

HOUSTON INDEPENDENT SCHOOL DISTRICT

Plaintiff – Counter Defendant – Appellee

v.

BOBBY R.; JOYCE R.; CAIUS R.

Defendants – Counter Claimants – Appellants

Appeal from the United States District Court
for the Southern District of Texas, Houston

ORDER:

IT IS ORDERED that the motion of the appellants to stay the mandate is DENIED.

IT IS FURTHER ORDERED that appellants' motion for an extension of 30 days, or, to and including March 6, 2000, to file their petition for rehearing/petition for rehearing en banc is DENIED.

/s/ *Jerry E. Smith*
JERRY E. SMITH
United States Circuit Judge